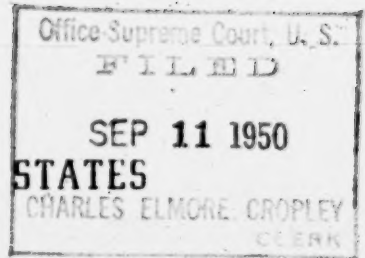


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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1950**

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**No. 29**

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**ARTHUR K. JEFFERSON,**

*Petitioner,*

*vs.*

**THE UNITED STATES OF AMERICA**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF AP-  
PEALS FOR THE FOURTH CIRCUIT**

---

**BRIEF FOR PETITIONER**

---

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**BRIEF FOR PETITIONER**

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**Opinion in the Court Below**

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 178 F. 2d 518. The opinions of the United States District Court for the District of Maryland are reported in 74 F. Supp. 209 and 77 F. Supp. 706.

**Jurisdiction**

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on 19 December 1949. Cer-

tiorari to review the judgment of the Court of Appeals for the Fourth Circuit was granted by this Court on 13 March 1950, upon a petition theretofore filed on 18 February 1950, and based upon Section 1254 (1) of Title 28, United States Code. This case presents a situation where the United States Court of Appeals for the Fourth Circuit has rendered a decision in conflict with another United States Court of Appeals on the same matter. See *Griggs v. United States*, 178 F. 2d 1.

### Statement of the Case

This action was brought on 31 July 1947 (R. 1) under the Federal Tort Claims Act (Act of 2 August 1946, c. 753, Title IV, 60 Stat. 842; 28 U.S.C. 931, *et seq.*)<sup>1</sup> The Government's motion to dismiss was overruled without prejudice on 29 October 1947. See *Jefferson v. United States*, 74 F. Supp. 209.

From the evidence presented at the trial, the District Court (Chesnut, J.) found, briefly summarized, the following facts:

On 3 July 1945, the petitioner, then a sergeant in the Army of the United States, underwent an abdominal operation at the Army hospital at Fort Belvoir, Virginia (R. 16, 17). During the operation a towel 30 inches long by 18 inches wide, bearing the legend "Medical Department U. S. Army," was negligently left in his abdomen (R. 21). He was honorably discharged from the Army on 9 January

<sup>1</sup> On 1 September 1948, while this action was pending, the new Judicial Code became effective. In it the provisions of the Act were recodified as Sections 1346 (b), 2401 (b) and 2671-2680. Since the rights of litigants of impending actions are preserved as they were under the prior law (Section 2(b) of Act of 25 June 1948, P. L. 773, 80th Congr. 2d Sess.), we will refer to the Sections in the Act as originally enacted. The Government has not contended that the change in wording in the recodification was intended to narrow the scope of jurisdiction of the Act.

1946 (R. 17), and the towel was not removed until it was discovered during a subsequent emergency operation at The Johns Hopkins Hospital in Baltimore on 13 March 1946 (R. 17-18). As a post-operative result of the removal of the towel, petitioner, a mechanic by trade, sustained a serious hernia, and is totally and permanently disabled (R. 18-19). After deducting past and prospective Veterans Administration benefits, the District Court concluded that, if the action is maintainable under the Tort Claims Act, petitioner is entitled to a verdict of \$7500.00 (R. 21). Ruling, however, as a matter of law, that the Tort Claims Act does not cover the situation presented by this case, the District Court dismissed the action (R. 31). The judgment of the District Court was affirmed by the Court of Appeals for the Fourth Circuit on the same ground (R. 43-45).

### **Errors Below Relied on Here**

Petitioner submits that the lower court was in error in deciding:

That the Federal Tort Claims Act does not permit petitioner to recover on his claim for injuries negligently inflicted upon him by Government personnel while he, as a member of the armed forces, was undergoing treatment in an Army hospital.

### **Questions Presented**

In *Brooks v. U. S.*, 337 U. S. 49, 93 L. Ed. 1200, this Court held that the Government is liable under the Federal Tort Claims Act to a soldier on furlough for injuries then tortiously inflicted by other military personnel. The question presented here is:

Is a soldier on hospital status in an army hospital, as distinguished from military duty, entitled to recover for injuries caused by the negligence of hospital personnel acting within the scope of their employment?

In the *Brooks* case this Court answered in the affirmative the question as to whether members of the United States armed forces can recover under the Tort Claims Act for injuries *not* incident to their service. The opinion in the *Brooks* case expressly reserved, however, the question as to whether servicemen can recover under the Act for injuries *incident* to their service (337 U. S. 49, 52; 93 L. Ed. 1200, 1204). Here, consequently, two questions are presented:

- (1) was petitioner's injury incident to his service?; and
- (2) if his injury was incident to his service, can he recover under the Tort Claims Act?

## ARGUMENT

### I

#### **Was Petitioner's Injury Incurred Incident to His Service?**

Petitioner urges that his injury was not "incident to his service", in the ordinary connotation of the phrase, and hence maintains that he should be entitled to recover under the *Brooks* decision.

Petitioner's injury was not an injury incurred in the performance of petitioner's normal and usual military duties, incurred as it was while he was a patient in an Army hospital receiving treatment for cholecystitis (R. 17), an organic ailment wholly unconnected with his service in the armed forces. It might be contended that petitioner was required to undergo the hospital treatment for the purpose of maintaining his military fitness but, by analogy, the same argument might have been advanced in the *Brooks* case, i.e., that the military personnel there were on furlough for the purpose of rest and rehabilitation designed to better

suit them for military service. The risks and dangers ordinarily incident to military service do not include injuries resulting from the negligence of an Army surgeon in the treatment of an ailment unconnected with such service. Petitioner's injuries were incident to his service only "in the sense that all human events depend upon what has already transpired", as Mr. Justice Murphy expressed it in the opinion in the *Brooks* case. The word "incident" means apt to occur. *Smith v. New York Life Ins. Co.*, 86 N. E. 2d 340, 342, — La. —. And it has been held that the negligence of a fellow servant is not an "incident of the employment" and the servant does not assume the risks thereof unless they are obvious and patent. *Smith v. Stuart C. Irby Co.*, 151 S. W. 2d 996, 997, 998, 202 Ark. 736. Surely petitioner's injury was not such as was apt or likely to occur in connection with his military service.

The phrase "incident to his service" has not been defined by statute. The Judge Advocate General of the Army, however, has said that the phrase, as used in connection with property claims, refers to "damages, loss or destruction of property being used by the claimant in the actual performance of some official duty at the time the damage, loss or destruction occurs . . .". See "Claims By and Against the Government", Judge Advocate General's School Text No. 8, p. 39 (1944).

It is true that petitioner was on "active duty" while hospitalized, but so were the Brooks brothers on "active duty" while on furlough. See *Moore v. United States*, 48 Ct. Cl. 110, 113. The decision of the Second Circuit in *Feres v. United States*, 177 F. 2d 535, 537, erroneously regards the servicemen in the *Brooks* case as not having been on "active duty". They were.

A soldier on furlough receives army pay and allowances (see The Judge Advocate General's School Text No. 3

"Military Affairs" p. VIII-25), is subject to the Articles of War and courts-martial (see Manual For Courts-Martial. U. S. Army—1949—par. 10, pp. 10-11), and is entitled to army hospitalization and medical care (see second Fourth Circuit decision in *Brooks* case, 176 F. 2d 482). If injured while on furlough and discharged from the Army, he is entitled to benefits under the Veterans Act only because he was disabled in line of duty while on *active* duty. Active duty status is one of the prerequisites of the Veterans Act of 1924, as amended, which provides for the payment of disability benefits (38 USCA 701 (a)) to:

"(a) Any person who served in the active military or naval service and who is disabled as a result of disease or injury or aggravation of a preexisting disease or injury incurred in line of duty in such service."

If fatally injured while on furlough, his legal representative is entitled to the six months death gratuity (10 USCA 903 and 456a). These benefits inure to the soldier on furlough, as was illustrated in the *Brooks* case, solely because he was on *active duty* and was injured "in line of duty". The theory is set out in *Moore v. U. S.*, 48 Ct. Cl. 110, 113, *supra*:

"As a general proposition, we believe a soldier is in line of duty until separated from the service by death or discharge, if during such time he is submitting to all of its laws and regulations. \* \* \* The provisions for furloughs or leaves of absence are a part of the disciplinary regulations of the military service, and no more separate a man from the service than an order to report to a different command."

For the historical development of the rule see The Judge Advocate General's School Text No. 3 "Military Affairs" (1943 ed.) pages X-26 to X-34.

It is submitted that the decision in the *Brooks* case should control here. If the injury and death of the servicemen there was compensable under the Tort Claims Act, then this petitioner should be entitled to recover, without regard to the question of whether injuries "incident to the service" are within the purview of the Act. Whether injured on furlough or in an army hospital, each is on active duty and subject to military control though not engaged in the performance of their *normal* duties, each is entitled to the same special statutory benefits and it is submitted that both should be entitled to the benefits of the Tort Claims Act.

## II

### **If Petitioner's Injury Was Incident to His Service, Can He Recover Under the Tort Claims Act?**

The implication of this Court's opinion in the *Brooks* case, of course, was that "an army surgeon's slip of hand" (or the failure to remove a huck towel placed in a patient's stomach in the course of surgery) is an accident connected with a soldier's military career, a casualty *incident* to military service. Purposely, no opinion was expressed by the Court as to the coverage of the Federal Tort Claims Act as to injuries incident to service, such injuries, according to the *Brooks* opinion, presenting "a wholly different case". Petitioner respectfully disagrees.

The Federal Tort Claims Act was intended as a complete abandonment and a general waiver of the doctrine of sovereign irresponsibility for the torts of Government employees acting within the scope of their employment, subject only to the twelve exceptions enumerated in the Act itself. As to the question involved in the instant case, the Act is just as clear and unambiguous as it was in the *Brooks* case.

Where the words of a statute are plain, there is no room for construction; where the language is clear, it is conclusive. *Osaka Shoshen Kaisha Line v. United States*, 300 U. S. 98, 101, 81 L. Ed. 532, 534-535; *Caminetti v. United States*, 242 U. S. 470, 485, 61 L. Ed. 442, 453.

In the *Brooks* case this Court followed the literal language of the Act in permitting the petitioner there to recover, holding that the term "any claim"<sup>2</sup> as used in the Act does not mean "any claim but that of servicemen." The twelve lengthy and specific exceptions in the Act, none of which excludes servicemen, and the thirteenth exception which would have excluded service-connected claims had it not been stricken out of the bill by Congress, made it clear, in the opinion of this Court, that Congress knew what it was about when it used the term "any claim". The opinion points also to the long legislative history of the Act to show that Congress advisedly declined to exclude members of the armed forces from the benefits of the Act, for 16 of the 18 bills introduced in Congress between 1925 and 1935 for a tort claims act had proposed the exclusion of claims of servicemen (337 U. S. 49, 50, 93 L. Ed. 1200, 1203; *Griggs v. United States*, 178 F. 2d 1, 3).

As the tort claims bill was originally proposed to Congress sovereign immunity was not waived as to claims for which veterans' compensation was being paid. H. R. 7236, 76th Congress, First Session (1939) and H. R. 181, 79th

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<sup>2</sup> 28 USCA 931 (1946) provided ". . . The United States District Court shall have exclusive jurisdiction to hear, determine and render judgment on any claim against the United States . . . for account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government . . .".

By the 1948 revision of the United States Code, the Federal Tort Claims Act was amended and now provides for exclusive jurisdiction "of civil actions on claims against the United States" (28 USCA 1346(b)). The change in phraseology has not been regarded as indicating a Congressional intent to narrow the scope of the Act. See *Griggs v. U. S.*, 178 F. 2d 1, 2.

Congress, First Session (1946) had a thirteenth exception excluding from "any claim":

"All claims for which compensation is provided by the . . . World War Veterans Act of 1924, as amended".

This exception would have denied a cause of action to ex-servicemen for injuries incurred on *active duty* and *in line of duty* for which veterans' benefits are payable (see 38 USCA 701 (a), supra, p. 6) and would have excluded the claim at bar had Congress not taken it out. Yet the court below attempts to put it back in the Act. As Chief Judge Parker said in his dissenting opinion in the *Brooks* case (169 F. 2d 840, 849) and should have said in this case: "In my opinion the court is without power to write back into an act by interpretation a section which Congress has thus deliberately omitted . . . Congress could not be presumed to intend that an exception apply, when it deliberately struck the exception from the act, upon its passage."

Judge Parker said also in his dissenting opinion in the *Brooks* case (169 F. 2d 840, 846-847) with which this Court agreed (337 U. S. 49, 51, 93 L. Ed. 1200, 1203):

"The principal question in the case is whether the court shall read into the act an exception excluding soldiers from the right to recover under its provisions. I see no basis for reading such an exception into the act. Legislation is a matter for Congress, not for the court; and the language used by Congress clearly covers soldiers as well as civilians. It is neither reasonable nor respectful to Congress for the courts to assume that the import of the general language used in the statute was not understood or that language excluding soldiers from the benefit of the act was omitted through inadvertence. The act was passed at a time when the country was deeply conscious of the rights and claims of soldiers. The greatest army in

the history of the country was being demobilized but many hundreds of thousands of men were still under arms, and it is hardly probable that Congress could have overlooked the fact that claims on their part would be covered by the general language used. \* \* \*

It is not reasonable to assume that the claims of soldiers were overlooked at a time when soldiers and their rights were so prominently in the public mind, when prior proposed legislation dealt explicitly with that matter and when the act itself repealed legislation under which limited relief could be granted them."

Petitioner proposes that the cogent reasoning of Judge Parker is equally as applicable here as in the *Brooks* case, even though this petitioner's claim be considered as one for injuries caused by or incident to his service. Pursuing Judge Parker's thoughts to a logical conclusion, it is manifest that the question here is whether the court shall read into the Act an exception excluding soldiers from the right to recover for injuries incident to their service. The language used by Congress clearly covers injuries incident to the service as well as injuries not incident to the service, and petitioner maintains that here, as in the *Brooks* case, it would be both unreasonable and disrespectful to Congress to assume that the Act was carelessly drawn or its import misunderstood.

The Tort Claims Act, passed as an integral part of the Legislative Reorganization Act of 1946 (60 Stat. 812, 842; 28 USCA 921-46), has a double purpose. It removes the anachronistic doctrine of sovereign immunity to actions in tort, thus making the Government, the largest of all businesses, liable for the negligence of its employees acting within the scope of their employment and it is designed to relieve Congress of the burden of handling the thousands of private bills for relief that heretofore were presented each year in the absence of any other remedy. See Sen. Rep. No. 1400, 79th Cong., 2d Sess. (1946) H. R. Rep. No. 1287, 79th Cong., 1st Sess. (1946).

These broad purposes show a new policy and different philosophy than that underlying the *maritime* statutes construed in *Dobson v. U. S.*, 27 F. 2d 807, and *Bradley v. U. S.*, 151 F. 2d 742, and it is submitted that these decisions should not be used to whittle down the Act by implication. In keeping with these considerations, this Court in the *Brooks* case expressly discredited the argument that the comprehensive system of special statutory benefits for service connected disabilities to servicemen showed an intent on the part of Congress to bar servicemen from the benefits of the Act (337 U. S. 49, 53; 93 L. Ed. 1200, 1204). See also *Santana v. United States*, 175 F. 2d 320. *Coytra*, see *Feres v. United States*, 177 F. 2d 535. Unlike Workmen's Compensation statutes, there is nothing in the veterans' or servicemen's benefit statutes providing for exclusiveness of remedy. If there were, this Court should have denied recovery in the *Brooks* case instead of using the statutory benefits to reduce damages assessable against the Government. On the remand of the *Brooks* case the Fourth Circuit directed the District Court to give the Government credit for army pay, for hospitalization and medical care furnished by the Government, and for veterans' benefits, in the case of the injured soldier; and for the death gratuity under 10 USC 903 in the case of the soldier who was killed in the accident. See *U. S. v. Brooks*, 176 F. 2d 482.

Long before this ruling, however, counsel for petitioner had conceded that such a reduction was proper in this case (R. 15-16) and the District Court deducted past and prospective veterans' benefits in the computation of damages to which ~~it~~ felt petitioner would be entitled, were recovery allowed (R. 21).

Thus, whenever a serviceman is permitted to recover under the Tort Claims Act he would receive but just compensation for injuries suffered by him through the negligence of other government employees, and the Government would be required to pay no more than reasonable com-

pensation, assessed by the trial court without a jury (28 USCA 931).

This court's opinion in the *Brooks* case calls attention to the *Military Claims Act* (57 Stat. 372; 31 USCA 223(b)) as possibly indicating a congressional intent to deny the general waiver of sovereign immunity to claims of military personnel for service-connected injuries because it excludes claims of military personnel for injuries or death occurring "incident to their service". The *Military Claims Act* contains the following provision:

"The provisions of this Act shall not be applicable \* \* \* to claims for personal injury or death to military personnel or civilian employees of the Department of the Army or of the Army if such injury or death occurs incident to their service."

Petitioner denies, however, that this provision is indicative of such a congressional intent under the Tort Claims Act. The Military Claims Act dealt with claims not necessarily based on negligence; liability there existed irrespective of the fault of army civilian or military personnel, except that negligence of the claimant bars recovery. And insofar as it is concerned with claims cognizable under the Tort Claims Act, it has been repealed by Section 424 (b) of the original Tort Claims Act (28 USCA 946), though there is a saving clause as to any claim which is not caused by the *negligence* of government employees.

It does not appear from the record whether the failure to remove the towel from the petitioner's abdomen was due to negligence of military or of civilian employees of the Army (R. 21). But even if the negligence is that of a soldier instead of a civilian employee at the hospital, the Government would still be liable.

At common law a soldier is liable in tort just as any other citizen. *Little v. Barreme*, 2 Cranch. 170, 171, 2 L. Ed. 243; *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75; *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471; *Franks v. Smith*,

142 Ky. 232, 134 SW 484, LRA 1915A, 1141, Ann. Cas. 1912D 319; *Bishop v. Vandercook*, 228 Mich. 299, 200 NW 278; *State v. Sparks*, 27 Tex. 627. In 1616 this principle was applied even to soldiers *inter sese*, while both were on active duty, in *Weaver v. Ward*, Hobart 134, 88 Eng. Reprint 284, 135 ALR 29. Servicemen are specifically designated as federal employees by the Tort Claims Act and Congress is presumed to know that the Government would be liable for injuries negligently inflicted upon one government employee by another under the familiar common law doctrine of *respondeat superior*, subject, of course, to the defense of the fellow servant doctrine and to other recognized defenses. And, there is nothing in the Tort Claims Act to negative this liability.

The District Court concluded that under the law of the State of Virginia as applied to the facts, tort liability had been established against the Government if sovereign immunity had been waived (R. 21, 42).

Of the 12 exceptions in the Act itself (28 USCA 943 (1946)) only 2 are relevant here: (1) Subsection (a) which exempts the Government from liability in tort in the execution of laws or for the misuse of executive discretion; and (2) Subsection (j) exempting any claim arising out of combatant activities of the armed forces.

Neither bars recovery in this case. Removal of the towel from the Petitioner's abdomen before the surgical wound was sewed up was a ministerial act requiring no exercise of judgment or discretion, or a choice of action. It should have been removed, (See *Castley v. U. S.*, 181 F. 2d 723; *Griggs v. U. S.*, 178 F. 2d 1; cf. *Denny v. U. S.*, 171 F. 2d 365; cert. den. 337 U. S. 919, 93 L. Ed. 1728) and failure to remove it was negligent performance of a ministerial act for which a Government employee has always been held liable in tort and still is under subsection (a), which codifies the common law rule. See *Tracy v. Swartwout*, 10 Pet. 80, 95, 9 L. Ed. 354, 359; *Little v. Barreme*, 2

Craneh. 170, 2 L. Ed. 243; see *Philadelphia Co. v. Stimson*, 223 U. S. 605, 618, 56 L. Ed. 570, 575 et seq.; *American School, etc. v. McAnnulty*, 187 U. S. 94, 108, 110, 47 L. Ed. 90, 96, 97; *Hopkins v. Clemson*, 221 U. S. 636, 642, 643, 645, 55 L. Ed. 890, 894, 895. Petitioner's claim arose out of noncombatant activities in Virginia and the Government has not contended that it falls within exception (j).

Another consideration raised by this Court in the *Brooks* opinion was that, "despite literal language and other considerations to the contrary", the allowance under the Tort Claims Act of claims incident to service might produce a result "so outlandish that even the factors we have mentioned would not permit recovery". Petitioner does not feel that the result would be outlandish, nor that "dire consequences" would ensue, as was urged upon this Court by the Government in the *Brooks* case.

Recovery here would not be foreign to recognized principles of tort law. The Government is under a duty to furnish medical services, hospitalization and nursing to servicemen (see *U. S. v. Standard Oil Co.*, 332 U. S. 301, p. 304 footnote 5, and p. 317, 91 L. Ed. 2067, 2070, 2076), and it would be liable under the law of Virginia, if it is treated as a private individual. In *Virginia Iron, etc. Co. v. Odle's Adm'r*, 128 Va. 280, 301; 105 S. E. 107, 114, the Court said:

"As to . . . where there is a 'personal contract to provide competent medical attention', the master is liable to the servant for injury resulting from the negligence or malpractice of the physician or surgeon employed by him, it is unnecessary to cite authority, as the proposition is elementary and undisputed."

And in *Stuart Circle Hospital Corp. v. Curry*, 173 Va. 136, 3 S.E. 2d 153, the hospital was held liable for the negligence of its staff.

The Government has nothing to fear. In the proper case it may avail itself of the defenses of fellow servant, volun-

tary assumption of risk and contributory negligence. The Comptroller General has already used the fellow servant doctrine to bar recovery under the Tort Claims Act for an accident that occurred at an army depot in Virginia. See Comp. Gen. Dec. B-77926, decided 14 October, 1948.

Nor would dire consequences follow in the case of a "battle commander's poor judgment, an Army surgeon's slip of hand, a defective jeep which causes injury \* \* \*" (*Brooks* case). The Act itself (28 USCA 943(a)) bars recovery for a battle commander's poor judgment (See *Denny v. U. S.*, 171 F. 2d 365, *supra*,) as well as for the surgeon's slip of hand or the injury caused by the defective jeep, if the claim arose out of combatant activities (28 USCA 943(j)). In these cases nonliability is determined by the specified activity rather than culpability.

Moreover, in cases not barred by the Act itself, the serviceman could recover only if he successfully overcame the defenses available to the Government under familiar rules of state law. In view of such protection, it is submitted, there is no valid reason why the claims of servicemen incident to their service should not be treated like other claims. Moreover, as was said in *Griggs v. U. S.*, 178 F. 2d 1, *supra*: "If the result of its omission to exempt such claims leads to dire consequences and absurd results, it is for Congress and not this Court to provide rational limitations".

The lower court in this case reasoned in its opinion that *military discipline* requires the exclusion of injuries incident to service from the coverage of the Act, expressing the fear that the military command would be subjected "to public criticism and rebuke of any member of the armed forces who chose to bring a suit against the United States," by reason of injuries caused by the negligence of a superior officer. In this particular case, of course, there was no finding that petitioner's injuries were caused by a superior officer, but instead it was found by the District Court that

the failure to remove the towel constituted "negligence on the part of agents or employees of the government at the hospital" (R. 21). Such agents or employees, of course, conceivably could have been civilians or persons of lesser rank than petitioner. And, in the *Griggs* case, the deceased held the rank of Lieutenant Colonel, which would seem to make inappropriate the reasoning adopted by the Fourth Circuit.

In any event, petitioner here does not feel that military discipline would be adversely affected by the allowance under the Act of claims incident to service. On the contrary, military personnel likely would be better disciplined, more willing to perform their duties, if they could be secure in the knowledge that the Government had accorded them the right to recover for injuries negligently inflicted upon them. The increasing tendency of Congress to bestow benefits of all kinds upon servicemen seems to support this view, as would the fact that the military forces in World War II were probably accorded more rights and more benefits than at any other time in the history of this country, with the result that such military forces were the best disciplined this country has ever produced.

Moreover, the Articles of War and the system of courts-martial are quite adequate to meet the needs of any occasion insofar as military discipline is concerned.

The Fourth Circuit expressed also the view that the civil courts would be required to pass upon the propriety of military decisions if recovery were permitted here. This position is untenable, for clearly no military decision was involved in the performance of surgery. See *Costley v. United States*, 181 F. 2d 723, *supra*.

Nor could there be any interference through the Tort Claims Act with the propriety of military decisions in any case because of exception (a) of the Tort Claims Act (*supra*

pp. 6) which, codifying the common law rule, clothes public officers with immunity while performing public duties involving the exercise of discretion. See *Dinsman v. Wilkes*, 12 How. 390, 403. Thus it is quite clear that the Government cannot be held liable under the doctrine of *respondeat superior* for military decisions whether or not a discretion has been abused.

There is also, we submit, no merit to the Fourth Circuit's proposition that application of the law of negligence in the several states would affect the government-soldier relationship. Purely of federal creation, that relationship is not changed by the state law of negligence. State law would determine the nature and extent of Government liability for the tortious acts of government employees, servicemen included, (see 28 USCA 941 (b)), but only with respect to a relationship between the Government and its employees as established by Congress.

The defense that the government-soldier relationship constitutes a bar to recovery for injuries incident to the service is the equivalent of an assertion that the Tort Claims Act does not apply to those cases wherein the negligence occurs during the exercise of any sovereign power of the United States, as distinguished from those of a proprietary nature. This defense, however, was considered and rejected by the United States District Court, N. D. California, S. D., in *Cerri v. United States*, 80 F. Supp. 831, where it was said (p. 833):

"The defense \* \* \*, if heeded, would create a twilight zone of governmental activities in which the consent given by this statute could not be applied. Too numerous are the affairs of a purely governmental or sovereign nature, prohibited to or not duplicated by the activities of private individuals, to consider this to be the intent of Congress. \* \* \*

"The phrase '\* \* \* where the United States, if a private person, would be liable \* \* \*', 28 USCA sec.

921. and sec. 931, is not to be understood to mean that the United States can be sued only if a private person can be sued under the identical circumstances. This phrase does not determine the relationship of the government to its employees, but rather determines the relationship of the government to third parties. *The act gives the consent of the United States to be treated by the injured party as if it were a private individual, amenable to court action without claim of immunity, in all those cases, not exempted by the act, where the negligence of its agents, servants or employees has caused injury or damage to third parties*" (italics supplied).

Petitioner here contends that for the purposes of his claim he occupies the position of a "third party", injured by reason of the negligence of governmental agents, servants or employees. The fact that a form of employer-employee relationship existed between petitioner and the government at the time of the injury complained of should constitute no greater obstacle to recovery here than it did in the *Brooks* case.

Finally, if by judicial fiat servicemen other than those on furlough are excluded from the benefits of the Tort Claims Act an outlandish result which Congress hardly could have intended would come to pass. Let us suppose that two soldiers, one on furlough and one engaged in military duty as a messenger, while standing together on a sidewalk at a street intersection are instantly killed when struck by an army truck negligently operated by another soldier acting within the scope of his employment. The legal representative of the soldier on duty would be entitled only to the six months' death gratuity of several hundred dollars, whereas the legal representative of the one on furlough would be entitled to receive the death gratuity and, let us suppose, \$25,000.00 under the Tort Claims Act (that was the amount recovered in the *Brooks*

case) from which the death gratuity would be deducted. Could Congress have intended such disparity in damages for the death of two servicemen due to negligence of another federal employee?

### Conclusion

The language of the Federal Tort Claims Act is clear, and the obvious intent of Congress is reflected by a literal interpretation of the Act. The Act was intended to be broad in scope, was designed to create new liabilities on the part of the Government.

As Mr. Justice Reed declared in *American Stevedores v. Porello*, 330 U. S. 446, 453, 91 L. Ed. 1011, 1018:

"The passage of the Suits in Admiralty Act, the Public Vessels Act, and the Federal Tort Claims Act attests to the growing feeling of Congress that the United States should put aside its sovereign armor in cases where federal employees have tortiously caused personal injury or property damage."

In this setting, a congressional purpose to permit recovery by servicemen for injuries either incident to or wholly unconnected with their military service cannot be considered anomalous. On the contrary, such a purpose is entirely in conformity with the fundamental departures being made by Congress from long-standing policies of immunity.

Petitioner respectfully requests that the judgment of the lower court be reversed.

Respectfully submitted,

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